ESTATE OF LEONA KETCHESHAWNO WATERMAN ELY

IBIA 91-18 Decided August 21, 1991

Appeal from an order denying petition for rehearing issued by Administrative Law Judge Sam E. Taylor in Indian Probate IP OK 229 P 88.

Affirmed.

1. Indian Probate: Wills: Undue Influence

To invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of her will was capable of controlling her mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to the decedent's own desires.

2. Indian Probate: Wills: Undue Influence

When the evidence shows that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption of undue influence is raised, and the burden of rebutting the presumption is on the will proponent.

3. Indian Probate: Wills: Testamentary Capacity: Generally

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of her bounty, the extent of her property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

APPEARANCES: Barry Benefield, Esq., Oklahoma City, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Shirley Chakenatho seeks review of a September 25, 1990, order denying petition for rehearing issued by Administrative Law Judge

Sam E. Taylor in the estate of Leona Ketcheshawno Waterman Ely (decedent). 1/ For the reasons discussed below, the Board affirms that order.

Background

Decedent, an unallotted member of the Prairie Band of Potawatomi Indians, was born on July 26, 1911, and died testate on February 22, 1988. She left no immediate family. In her will, executed on November 24, 1987, she devised her entire estate to Bobby Lee White, who was not related to her.

Judge Taylor held hearings to probate decedent's trust estate on December 1, 1988, and February 15, 1989, at Shawnee, Oklahoma. At the second hearing, some of decedent's cousins challenged her will on the grounds that she lacked testamentary capacity and was subjected to undue influence. 2/

In an order approving decedent's will issued on January 31, 1990, Judge Taylor determined that decedent's heirs at law, who would have shared in her estate had she died intestate, were 24 cousins and cousins once removed. The Judge found, however, that decedent had the requisite testamentary capacity and was not unduly influenced in the making of her will. Accordingly, he held that the will was valid.

Appellant's petition for rehearing was based primarily upon two incorrect statements in decedent's will, which appellant argued were evidence of decedent's lack of testamentary capacity. These were the identification of decedent as a member of the Kickapoo Tribe, rather than the Prairie Band of Potawatomi Indians, and the identification of White as decedent's cousin.

Judge Taylor denied appellant's petition for rehearing on September 25, 1990. His order stated in part:

> The simple fact that the decedent is identified as a member of the Kickapoo Tribe of the State of Oklahoma whereas she was

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1/ Appellant states that she appeals on her own behalf and on behalf of other cousins of decedent, although she does not state which ones. Presumably, at least one cousin is not among those appellant claims to represent. A statement filed by Adeline DuBoise at the time appellant filed her petition for rehearing states: "I am opposed to the petition for rehearing of [decedent's] will. [Decedent] had a choice and she chose Bobby White for her own reasons. I am satisfied with her choice and I respect her wishes."

The Board cannot recognize anonymous appellants and so must consider this appeal to have been filed by appellant on her own behalf only.

2/ Seven of the cousins signed a statement authorizing appellant and Robert Ketcheshawno to represent them at the Feb. 15, 1989, hearing. These were: Amelia BearBow; Susie Meshquekennock; Irene Frye; Rufus B. Atchico; Shirley Ketcheshawno Delgado for minor, Brenna Ketcheshawno; Marie E. Valdez; and Arthur L. Ketcheshawno.

> actually a member of the Prairie Band of Potawatomi Indians of Kansas is not sufficient to prove that she lacked testamentary capacity. The decedent was part Prairie Band Potawatami by her father and part Kickapoo of Oklahoma by her mother. Further, she had lived and associated with the Kickapoo Tribe of the State of Oklahoma for many years immediately prior to her death and was well know therein and at the Shawnee Agency of the Bureau of Indian Affairs which has jurisdiction over the Kickapoo Tribe of Oklahoma.
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> Similarly, the fact that she identified Bobby Lee White as a cousin when in fact he is not, is not sufficient to show that she lacked testamentary capacity. Many of the older Indians such as the decedent believe that they are or may be remotely related to most other Indians of their tribe or tribes. Not knowing precisely how they are related, they simply call each other cousins.

The Board received appellant's notice of appeal on November 28, 1990. Only appellant filed a brief.

Discussion and Conclusions

On appeal to the Board, appellant appears to have abandoned her argument that decedent lacked testamentary capacity in favor of an argument that decedent was subjected to undue influence by White. 3/ She argues that decedent and White were in a confidential relationship and that Judge Taylor erred in failing to apply the presumption of undue influence which arises in a case where a confidential relationship is found to have existed.

[1, 2] Normally, to invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of her will was capable of controlling her mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to the decedent's own desires. E.g., Estate of Joseph Poolaw, 18 IBIA 358 (1990). Further, the burden to prove undue influence is upon the will contestant. E.g., Estate of Alice Jackson (John), supra. However, when the evidence shows that the principal beneficiary under a will was in a confidential relationship with the testator and

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3/ Arguably, appellant's undue influence argument is subject to rejection by the Board on the grounds that she failed to raise the issue in her petition for rehearing. The Board has held on many occasions that it is not required to consider arguments that were not raised in a petition for rehearing. E.g., Estate of Alice Jackson (John), 17 IBIA 162 (1989), and cases cited therein.

The Board finds, however, that appellant's petition for reconsideration might conceivably be construed as having raised the issue indirectly. Therefore, the Board will not reject appellant's argument on this basis.

actively participated in the preparation of the will, a rebuttable presumption of undue influence is raised, and the burden of rebutting the presumption is on the will proponent. E.g., Estate of Jessie Pawnee, 15 IBIA 64 (1986).

Appellant contends that a confidential relationship between White and decedent is established by the facts that (1) White and his wife were the primary providers of decedent's care during the last several months before decedent entered a nursing home and (2) White had a power of attorney for decedent.

Even where a testator is entirely dependent upon a will beneficiary for shelter, food, and medication, a confidential relationship is not shown by these circumstances alone. Rather, in the cases where the Board has found a confidential relationship, the will beneficiary has had control over the testator's finances. See Estate of Virginia Enno Poitra, 16 IBIA 32 (1988).

The existence of a power of attorney may, in appropriate circumstances, establish that a confidential relationship existed. In Estate of Jessie Pawnee, supra, the Board found that, under the circumstances of that case, a confidential relationship came into existence when the power of attorney was signed. 15 IBIA at 68. In Pawnee, the power of attorney was signed on the same day the will was executed. In this case, the power of attorney was not signed until December 16, 1987, 3 weeks after decedent executed her will. 4/

The Board has thoroughly reviewed the record in this case and does not find evidence showing that White and decedent were in a confidential relationship on November 24, 1987.

Moreover, even if a confidential relationship had been proved, that alone would not shift the burden of proof. It must also be shown that White actively participated in the preparation of the will. The testimony of the will scrivener established that White was not present when the will was prepared and executed. Appellant contends that White must have discussed the will with decedent because the will shows White's date of birth, which decedent could not have known unless White had discussed the will with her. 5/ Any such discussion, appellant contends, constituted active

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4/ Decedent entered a nursing home on Dec. 17, 1987. It appears possible therefore that decedent executed the power of attorney for that reason. White testified, however, that the power of attorney was executed so that he could assist decedent in obtaining insurance for her car. White also testified that he believed the power of attorney had been executed prior to the will (Tr. 41-43).

5/ There is a question concerning the source of information as to White's date of birth, which is, as appellant contends, stated in the will. The will scrivener indicated that decedent furnished the information (Tr. 14). White stated he did not know how decedent could have known his date of birth (Tr. 44). The record includes a background information sheet for decedent's will which shows White's date of birth. It is not clear who prepared the document or when it was prepared. It is shown as having been received at the Shawnee Agency on Aug. 17, 1987.

participation by White. Appellant's contention that such discussions occurred is speculative, as is her implied contention that White, rather than decedent, controlled the purported discussions. Even if discussions did take place, however, they would not constitute active participation by White under the circumstances of this case. Because White was not present when the will was prepared, decedent had the opportunity to disregard any suggestions he might have made beforehand, if those suggestions were contrary to her own wishes.

The Board finds that Judge Taylor did not err in requiring appellant to bear the burden of proving undue influence upon decedent. It next considers whether appellant has carried her burden.

The will scrivener testified that he had known decedent since 1974 but was surprised to learn that she had so many relatives. He stated: "I guess I'd always had the opinion that she was a single woman with distant relatives. When she was making this Will I got the feeling, if she could have done it some other way she would have. If she had felt her family would have taken more interest in her" (Tr. 15). The scrivener also testified that he believed decedent felt she had a duty to devise her property to White because of the care he had provided her (Tr. 16).

White testified that he had known decedent all his life; that he and his wife began visiting decedent in 1982 or 1983 to read the Bible to her; and that, in July 1987, when she became seriously ill, they visited more frequently, providing transportation, grocery shopping, and other services. During a period when decedent required feeding through a tube, they visited every 4 hours to feed her (Tr. 36-38). White's testimony concerning the latter part of 1987 was confirmed generally by an Indian Health Service nurse who also visited decedent (Tr. 63-65). The record does not show that any of decedent's relatives participated in caring for her.

Under these circumstances, decedent's apparent feeling of duty toward White is understandable, as is her decision to devise her property to him instead of her relatives. The fact that decedent devised her property to White does not prove that he exerted undue influence upon her, and appellant has not shown that he did exert such influence.

The Board affirms Judge Taylor's holding that decedent was not subject to undue influence in the execution of her will.

[3] As noted above, appellant's brief before the Board does not appear to challenge Judge Taylor's conclusion concerning decedent's testamentary capacity. Upon review of the record, the Board finds his conclusion amply supported. To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of her bounty, the extent of her property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will. E.g., Estate of Virginia Enno Poitra, supra. The testimony of the will scrivener, who had known decedent for

many years, established that, at the time she executed her will, she knew her property and the natural objects of her bounty, and was clear about her intentions regarding her will (Tr. 12-16).

The Board agrees with Judge Taylor that the two errors in the will--the identification of decedent as a member of the Kickapoo Tribe and the identification of White as decedent's cousin--are insufficient to prove lack of testamentary capacity. Decedent was at least half Kickapoo, had lived in the Kickapoo area for many years, perhaps all her life, 6/ and received services from the Kickapoo Tribe. She might well have considered herself Kickapoo, as well as Potawatomi. 7/ Further, although White was not actually related to her, decedent might well have thought of him as a cousin. As Judge Taylor noted, an extended view of family relationships is not unusual among Indian people. To be sure, at the hearing in this case, Robert Ketcheshawno spoke of decedent as his sister when in fact she was his cousin (Tr. at 68-70). Since White was the person who cared for her, decedent may simply have come to regard him as a cousin. In any event, in light of the will scrivener's clear testimony concerning decedent's testamentary capacity, these minor errors in the will are unpersuasive evidence that decedent lacked such capacity.

The Board affirms Judge Taylor's holding that decedent had the requisite testamentary capacity to execute her will.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Taylor's September 25, 1990, order denying rehearing is affirmed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

6/ Her birth certificate shows that she was born in Lincoln County, Oklahoma.
7/ In fact, the will scrivener testified that she referred to herself as both (Tr. 23).